

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

GREGORY KELLY,

Plaintiff,

v.

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT, *et al.*,

Defendants.

2:12-cv-02074-LRH-CWH

ORDER

Before the Court is Defendant NaphCare, Inc.'s ("NaphCare") Motion to Dismiss. Doc. #84.<sup>1</sup> Defendants Las Vegas Metropolitan Police Department ("LVMPD") and William F. Catricala, Jr. ("Catricala") filed a Joinder to NaphCare's Motion to Dismiss. Doc. #98. Plaintiff Gregory Kelly ("Kelly") filed a Response (Doc. #101), to which NaphCare replied (Doc. #104).

Also before the Court is Defendants LVMPD, Catricala, Beau Hunn ("Hunn"), Thomas Carrigy ("Carrigy"), Ivens Munoz ("Munoz"), Christopher Garcia ("Garcia"), John Campbell ("Campbell"), Erick Wilds ("Wilds"), John Liberty ("Liberty"), Kidd Andrade ("Andrade"), and James Mizusaki's ("Mizusaki") (collectively "Defendants") Motion to Dismiss. Doc. #106. Kelly filed a Response (Doc. #109), to which Defendants replied (Doc. #111).

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<sup>1</sup> Refers to the Court's docket number.

1 **I. Facts and Procedural History**

2 This case arises out of an arrest and subsequent eight-hour detention at the Clark County  
3 Detention Center (CCDC). On December 5, 2010, LVMPD officers responded to a call reporting a  
4 domestic disturbance at Kelly's residence. During the arrest, Kelly claims he suffered injuries to  
5 his left shoulder and left thigh/knee. The officers later transported Kelly to CCDC, where Kelly  
6 claims he received no medical attention for his injuries, despite his waiting an extended period of  
7 time in the designated NaphCare waiting room. Kelly was eventually called for release, at which  
8 time he objected to the fact that he had not yet received a medical exam to document his injuries  
9 and requested a Magnetic Image Resonance ("MRI") scan. At that time, an unidentified NaphCare  
10 employee informed Kelly that an MRI scan was not available to pre-trial detainees. Because Kelly  
11 did not feel that an x-Ray, which would have been provided the following day, would have  
12 documented his claimed injuries, he agreed to his release without obtaining an x-Ray.

13 Thereafter, at various times, Kelly filed claims for administrative relief with LVMPD Risk  
14 Management, Internal Affairs, and the Citizen's Review Board. All of Kelly's grievances were  
15 denied. Kelly alleges that his claims were denied on the basis of false testimony and fraudulent  
16 reports submitted by the officers involved in his arrest and subsequent detention, and NaphCare  
17 employee Codi Courtney ("Courtney"). Kelly also alleges that the aforementioned false testimony  
18 and fraudulent reports were part of a conspiracy to cover up the alleged transgressions of the  
19 arresting officers. At no time until 2013 did Kelly seek medical treatment for his alleged injuries.  
20 Kelly alleges that he continues to suffer from the injuries he sustained during the December 5, 2010  
21 arrest.

22 On December 5, 2012, exactly two years after the alleged incident took place, Kelly filed a  
23 Complaint, alleging unwarranted entry, false arrest, false imprisonment, conspiracy for false  
24 imprisonment, deliberate indifference to his serious medical needs, municipal liability, battery,  
25 intentional infliction of emotional distress, malicious prosecution, and negligence. *See* Doc. #1.  
26 Thereafter, NaphCare filed a Motion to Dismiss Kelly's deliberate indifference claim and the

1 LVMPD and Catricala filed a Motion for Judgment on the Pleadings as to several of Kelly's  
2 claims. *See* Doc. #7, Doc. #13. On June 28, 2013, the Court granted NaphCare's Motion, finding  
3 that Kelly "failed to show his medical needs were serious." Doc. #54. The Court also granted the  
4 LVMPD and Catricala's Motion for Judgment on the Pleadings. *See id.* Because Kelly is a *pro se*  
5 litigant and had not yet amended his complaint, the Court granted leave to amend. *See id.* On  
6 August 1, 2013, Kelly filed a Second Amended Complaint, alleging nine causes of action. *See*  
7 Doc. #67. On August 15, 2013, NaphCare filed the present Motion to Dismiss Kelly's fourth, fifth,  
8 and sixth causes of action against NaphCare. Doc. #84. On October 7, 2013, Defendants filed the  
9 present Motion to Dismiss Kelly's fourth, fifth, sixth, and ninth causes of action. Doc. #106.

## 10 **II. Legal Standard**

11 NaphCare and Defendants seek dismissal of Kelly's fourth, fifth, sixth, and ninth causes of  
12 action pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which  
13 relief can be granted. To survive a motion to dismiss for failure to state a claim, a complaint must  
14 satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading standard. *See Mendiondo v.*  
15 *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That is, a complaint must contain  
16 "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ.  
17 P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require detailed factual allegations;  
18 however, a pleading that offers "'labels and conclusions' or 'a formulaic recitation of the elements  
19 of a cause of action'" will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*  
20 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

21 Furthermore, Rule 8(a)(2) requires a complaint to "contain sufficient factual matter,  
22 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550  
23 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows the Court to  
24 draw the reasonable inference, based on the Court's judicial experience and common sense, that the  
25 defendant is liable for the misconduct alleged. *See id.* at 678-79. "The plausibility standard is not  
26 akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has

1 acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's  
 2 liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* at  
 3 678 (internal quotation marks and citation omitted).

4 In reviewing a motion to dismiss, the Court accepts the facts alleged in the complaint as  
 5 true. *Id.* However, "bare assertions . . . amount[ing] to nothing more than a formulaic recitation of  
 6 the elements of a . . . claim . . . are not entitled to an assumption of truth." *Moss v. U.S. Secret*  
 7 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 681) (brackets in original)  
 8 (internal quotation marks omitted). The Court discounts these allegations because "they do nothing  
 9 more than state a legal conclusion—even if that conclusion is cast in the form of a factual  
 10 allegation." *Id.* (citing *Iqbal*, 556 U.S. at 681). "In sum, for a complaint to survive a motion to  
 11 dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be  
 12 plausibly suggestive of a claim entitling the plaintiff to relief." *Id.*

### 13 **III. Discussion**

#### 14 **A. Fourth Cause of Action—Falsification of Documents and Hindering a Lawful** 15 **Investigation, Resulting in Loss of Due Process Rights in Violation of** **42 U.S.C. § 1983**

16 To state a claim pursuant to 42 U.S.C. § 1983, a plaintiff must allege that the defendant  
 17 (1) while acting under color of state law (2) subjected him to the deprivation of any rights,  
 18 privileges, or immunities secured by the Constitution and laws of the United States. *Anderson v.*  
 19 *Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006). Thus, Section 1983, by its very terms, applies only  
 20 to deprivations of federally protected rights. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

21 Here, NaphCare and Defendants contend, among other things, that Kelly failed to  
 22 sufficiently allege a Section 1983 claim because he has failed to identify any underlying  
 23 constitutional or federal statutory right of which he was deprived. *See* Doc. #84, pp. 10-11;  
 24 Doc. #104, pp. 10-11; Doc. #106, p. 10. The Court agrees. In his Second Amended Complaint,  
 25 Kelly simply asserts that his "constitutional rights to substantive due process under the Fourteenth  
 26 Amendment" were denied, that he was "den[ied] . . . medical relief through proper administrative

1 channels,” and that he was “den[ied] administrative relief.” Doc. # 67, ¶¶ 107, 108, 109, 111, 112,  
2 113, 114. In his Opposition, however, Kelly appears to concede that he does not have a  
3 constitutionally protected right to the Administrative Relief venues of LVMPD Risk Management,  
4 Internal Affairs, and the Citizens Review Board. *See* Doc. #101, p. 12 (explaining that “[he] has  
5 not claimed that he had a Fourteenth Amendment right to the [aforementioned] Administrative  
6 Relief venues”). Rather, he avers, “[t]he ‘deprivation of rights’ under 42 U.S.C. § 1983 occurred at  
7 CCDC with the alleged falsification of [his] medical screening.” *Id.* Kelly goes on to state that  
8 “Defendant’s actions denied Plaintiff’s due process rights at [the LVMPD Risk Management,  
9 Internal Affairs, and Citizens Review Board Administrative proceedings].” *Id.* So far as the Court  
10 can ascertain, Kelly appears to assert that he had a constitutionally protected right to due process at  
11 the aforementioned administrative proceedings.

12 To that end, the Court is keenly aware that “[a] fair trial in a fair tribunal is a basic  
13 requirement of due process.” *In re Murchison*, 349 U.S. 133, 136 (1955). Moreover, the Ninth  
14 Circuit has acknowledged that “the Constitution guarantees plaintiffs the right of meaningful access  
15 to the courts, the denial of which is established where a party engages in pre-filing actions which  
16 effectively covers-up evidence and actually renders any state court remedies ineffective.” *Delew v.*  
17 *Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998). Nevertheless, these basic rules are simply  
18 inapplicable to the present controversy because Kelly has not been denied effective redress in state  
19 court. *See id.* (holding that the district court should have given plaintiffs an opportunity to re-file  
20 their Section 1983 action if the defendants’ alleged a cover-up that actually rendered all state court  
21 remedies ineffective). In the present action, Kelly can and has brought the alleged falsification of  
22 medical and police reports to the attention of the Court. As such, he has suffered no deprivation of  
23 due process as a result of the alleged abuses.

24 Moreover, Kelly provides no authority for the proposition that he was entitled to the same  
25 Fourteenth Amendment due process protections when he filed his grievances with LVMPD Risk  
26 Management, Internal Affairs, and Citizens Review Board. In fact, authority on the subject

1 strongly suggests that Kelly was not entitled to the same type of due process protections that the  
2 Fourteenth Amendment envisions. See *Lisle v. Baker*, No. 3:09-CV-00479-RCJ-VPC, 2010 WL  
3 3257883, at \*3 (D. Nev. August 16, 2010) (citing *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir.  
4 1993) (internal quotation marks omitted) (“[the prison] grievance procedure is a procedural right  
5 only, it does not confer any substantive right upon the [claimant]”); see also *Mann v. Adams*, 855  
6 F.2d 639, 640 (9th Cir. 1988) (holding that there is no legitimate claim of entitlement to a  
7 grievance procedure). “Hence, it does not give rise to a protected liberty interest requiring the  
8 procedural protections envisioned by the Fourteenth Amendment.” *Id.* (citing *Azeez v. DeRobertis*,  
9 568 F. Supp. 8, 10 (N.D. Ill. 1982)) (internal quotation marks omitted); see also *Ramirez v. Galaza*,  
10 334 F.3d 850, 860 (9th Cir. 2002) (agreeing with District Court that “because inmates have no  
11 constitutional right to a prison grievance system, the actions of the prison officials in reviewing his  
12 internal appeal cannot create liability under § 1983”).

13 Finally, Kelly has no constitutional right to accurate medical or police reports absent an  
14 allegation that the allegedly falsified reports rendered his trial fundamentally unfair. See  
15 *Richardson-El v. IDOC*, NO. 13-CV-00952-MJR, 2013 WL 5648264, at \*3 (S.D. Ill. October 15,  
16 2013); *Nowell v. Acadian Ambulance Serv.*, 147 F. Supp. 2d 495, 505 (W.D. La. 2001) (citing  
17 *Landrigan v. City of Warwick*, 628 F.2d 736, 745 (1st Cir. 1980)) (holding that “the mere filing of  
18 false police reports, by themselves without more, [does] not create a right of action in damages  
19 under 42 U.S.C. § 1983”); see also *Delew*, 143 F.3d, at 1221-23. Because Kelly has failed to allege  
20 the deprivation of any constitutional right in connection with the allegedly false reports, the Court  
21 shall grant NaphCare and Defendants’ Motions to Dismiss Kelly’s fourth cause of action in its  
22 entirety. Although Courtney did not move to dismiss Kelly’s fourth cause of action against him in  
23 his individual capacity, the Court dismisses the same for the aforementioned reasons.

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**B. Fifth Cause of Action—Civil Conspiracy to Commit Unlawful Entry, Unlawful Arrest and Excessive Force, Resulting in Loss of Due Process Rights in Violation of 42 U.S.C. §1983**

An allegation of conspiracy does not alone state a claim for relief under Section 1983; the plaintiff must also allege a constitutional violation. *Matthews v. Nevada*, No. 3:08-CV-00387-LRH-RAM, 2009 WL 3111762, at \*4 (D. Nev. September 22, 2009) (citing *Thore v. Howe*, 466 F.3d 173, 179 (1st Cir. 2006)) (while conspiracies may be actionable under Section 1983, there must have been an actual deprivation of a right secured by the Constitution and laws); *Girder v. City of Auburn, Ala.*, 618 F.3d 1240, 1260 (11th Cir. 2010) (“plaintiff may state a § 1983 claim for conspiracy to violate constitutional rights by showing a conspiracy existed that resulted in the actual denial of some underlying constitutional right”); *Cefau v. Village of Elk Grove*, 211 F.3d 416, 423 (7th Cir. 2000); *Young v. County of Fulton*, 160 F.3d 899, 904 (2d Cir.1998). Here, each of Kelly’s conspiracy-related allegations concern Defendants’ alleged falsification of medical and police reports and false testimony. For all of the reasons set forth in the above section dismissing Kelly’s fourth cause of action, the Court also finds that Kelly has not alleged a constitutional violation on which his fifth cause of action for civil conspiracy may proceed. *See Delew*, 143 F.3d at 1221-23 (holding that plaintiffs stated a claim under § 1983 where they alleged a constitutional violation of their right to meaningful access to the courts based on an alleged conspiracy to cover up the details of decedent’s death); *see also Dooley v. Reiss*, 736 F.2d 1392, 1394-95 (9 th Cir. 1984) (plaintiffs had no cause of action for conspiracy to conceal evidence where they had been successful in their first action despite the falsified testimony).

Insofar as Kelly’s civil conspiracy claim is titled “Conspiracy to Commit Unlawful Entry, Unlawful Arrest, and Excessive Force,” the Court finds that Kelly has not plead any facts that, if accepted as true, would state a claim under Section 1983. Each of Kelly’s allegations relate to actions taken long after the alleged unlawful entry, unlawful arrest, and excessive force took place. Kelly simply does not allege any facts related to a meeting of the minds prior to the alleged unlawful entry, unlawful arrest, and excessive force. Accordingly, the Court shall grant NaphCare

1 and Defendants’ Motions to Dismiss Kelly’s fifth cause of action in its entirety. Although  
 2 Courtney did not move to dismiss Kelly’s fifth cause of action against him in his individual  
 3 capacity, the Court dismisses the same for the aforementioned reasons.

4 **C. Sixth Cause of Action—Deliberate Indifference to Plaintiff’s Serious Medical**  
 5 **Needs in Violation of 42 U.S.C. § 1983**

6 A pretrial detainee’s right to obtain adequate medical treatment derives from the Due  
 7 Process Clause, not the Eighth Amendment’s protection against cruel and unusual punishment.  
 8 *See Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1187 (9th Cir. 2002) (citing *Bell v. Wolfish*,  
 9 441 U.S. 520, 535 (1979)) (where a plaintiff had not been convicted of a crime, but had only been  
 10 arrested, his rights derive from the Due Process Clause, not the Eighth Amendment’s protection  
 11 against cruel and unusual punishment). Nevertheless, “[w]ith regard to medical needs, the [D]ue  
 12 [P]rocess [C]lause imposes, at a minimum, the same duty the Eighth Amendment imposes:  
 13 ‘persons in custody ha[ve] the established right to not have officials remain deliberately indifferent  
 14 to their serious medical needs.’” *Id.* (quoting *Carnell v. Grimm*, 74 F.3d 997, 979 (9th Cir. 1996))  
 15 (applying the Eighth Amendment standard where arrestee’s rights derived from the due process  
 16 clause); *see also Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In the Ninth Circuit, the test for  
 17 deliberate indifference consists of two parts. *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir. 1991),  
 18 overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc).  
 19 First, the plaintiff must show a “serious medical need” by demonstrating that the “failure to treat a  
 20 prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton  
 21 infliction of pain.’” *Id.* at 1059 (citing *Estelle*, 429 U.S. at 104). Second, “a person is liable for  
 22 denying a prisoner needed medical care *only* if the person ‘knows of and disregards an excessive  
 23 risk to inmate health and safety.’” *Gibson*, 290 F.3d at 1187-88 (quoting *Farmer v. Brennan*, 511  
 24 U.S. 825, 837 (1994)) (emphasis added).

25 Here, NaphCare and Defendants contend that Kelly has, again, failed to sufficiently allege  
 26 that he had a serious medical need. *See* Doc. #84, p. 17; Doc. #106, pp. 4-7. Again, the Court



1 agrees. *See* Doc. #54 (Court Order finding that Kelly failed to adequately allege that his medical  
2 needs were serious). Specifically, the Court finds that Kelly's renewed allegations as to his medical  
3 condition have not been supplemented in any meaningful way, such that he may maintain a claim  
4 for a violation of his right to adequate medical care under the Fourteenth Amendment.  
5 Significantly, as the Court previously explained, Kelly did not seek medical care at any time in the  
6 years following his release from CCDC. *See* Doc. #67, ¶67 (admitting that the first time he sought  
7 medical treatment for his alleged injuries was in 2013). Kelly's allegation that he "filed an  
8 immediate claim with LVMPD Risk Management in an effort to procure medical diagnosis and  
9 treatment" does not change this fact. Filing an administrative grievance with LVMPD Risk  
10 Management is not an appropriate avenue to seek medical care for a serious medical need.  
11 Moreover, Kelly admits that he was informed through LVMPD Risk Management that he would  
12 have to pay for surgery to repair his injuries and then file a claim, however he never sought surgery  
13 in accordance with these directions.

14 Furthermore, as the Court previously noted, Kelly's lack of funds to obtain a private MRI is  
15 not a persuasive reason for failing to seek medical care for an allegedly serious medical condition.  
16 And again worthy of mention is the fact that Kelly could have received medical care if he had  
17 waited the night at CCDC, but chose to forego this opportunity. Finally, Kelly has not alleged that  
18 he has suffered any further *significant* injury as a result of the alleged failure to treat his condition.  
19 If anything his allegations amount to an admission that his own failure to obtain treatment for his  
20 alleged injuries has caused "nearly three years of unnecessary pain and suffering." *See* Doc. #67,  
21 ¶132.<sup>2</sup> Accordingly, the Court shall grant NaphCare and Defendants' Motions to Dismiss Kelly's  
22 sixth cause of action in its entirety.

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25 <sup>2</sup> The Court also notes that while Kelly had a Fourteenth Amendment right to be free from  
26 deliberate indifference to his serious medical needs while in the custody of NaphCare and Defendants,  
he did not have a right to follow-up care after he was indisputably released from their custody.

1           **D. Ninth Cause of Action—Negligence**

2           Kelly concedes to the dismissal of individual Defendants Andrade, Mizusaki, Liberty, and  
3 Wilds from his ninth cause of action. Accordingly, the Court shall dismiss the aforementioned  
4 individual Defendants from Kelly's ninth cause of action. The LVMPD is the only remaining  
5 Defendant in Kelly's ninth cause of action.

6           **E. Punitive Damages**

7           Because the Court is dismissing Kelly's fourth, fifth, and sixth causes of action against  
8 NaphCare, Kelly may not recover punitive damages against NaphCare. Accordingly, Kelly's claim  
9 for punitive damages, as asserted against NaphCare, shall be dismissed.

10          **IV. Conclusion**

11           For all of the aforementioned reasons, the Court dismisses Kelly's fourth, fifth, and sixth  
12 causes of action in their entirety. Because it is apparent to the Court that Kelly would be unable to  
13 cure the articulated deficiencies in his Second Amended Complaint, and because he has already had  
14 an opportunity to do so, the Court dismisses the above claims with prejudice. Additionally,  
15 because the Court is dismissing all claims against Defendant Courtney, Courtney's Motion to  
16 Quash the Insufficient Service of Process (Doc. #117) is denied as moot.

17  
18           IT IS THEREFORE ORDERED that NaphCare's Motion to Dismiss (Doc. #84) is  
19 GRANTED. Kelly's fourth, fifth, and sixth causes of action against NaphCare shall be  
20 DISMISSED with prejudice. Additionally, Kelly's forth and fifth causes of action against  
21 defendant Courtney shall be DISMISSED with prejudice.

22           IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (Doc. #106) is  
23 GRANTED. Kelly's fourth, fifth, and sixth causes of action against Defendants shall be  
24 DISMISSED with prejudice. Kelly's ninth cause of action as it pertains to Defendants Andrade,  
25 Mizusaki, Liberty, and Wilds shall be DISMISSED with prejudice.

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1 IT IS FURTHER ORDERED that Defendant Courtney's Motion to Quash (Doc. #117) is  
2 DENIED as moot.

3 DATED this 27th day of December, 2013.



LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE